Supreme Court, U.S.
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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RICHARD A. LAWRENCE *AS AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Question 1. Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

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INTEREST OF THE AMICUS CURIA

The Amicus Curia, Richard A. Lawrence, is a married man.[1] He has been married 45 years to the same woman. He provides this brief, in part, from the viewpoint of a married man, in support of Respondents and in suggestion of affirmance of the case below.

SUMMARY OF THE ARGUMENT

There is a valid issue of whether the Court lacks jurisdiction by virtue of domestic matters having never been granted to the Court by Article III of the Constitution.

The case lacks a substantial federal question. *Baker v. Nelson*, 409 U.S. 810 (1972) is supported by *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675 (2013), and is still good law.

Consideration of moral disapproval of homosexual conduct is not foreclosed by the case of *Lawrence v. Texas*, 539 U.S. 558 (2003). There is a public element in this case, that of marriage, that did not exist in *Lawrence*. *Stanley v. Georgia*, 394 U.S. 616 (1969) illustrates that what is legal in private does not carry over to approval in the public arena.

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[1] The Clerk of the Court has noted on the docket the blanket consent of all Respondents to the filing of *amicus curiae* briefs. Written consent from counsel for Petitioners to the filing of this *amicus curia* brief accompanies this *amicus curia* brief. The amicus curia, Richard A. Lawrence, states that no party to this case (or anyone else) has authored this brief or any part of this brief. He further states that neither he individually or in the capacity as counsel has received from any party in the case (or anyone else) any monetary contribution to fund or that is intended to fund the preparation or submission of this brief.

The matter should be left to voters of the States and to the open forum of democracy.

Courts which have found same-sex marriage to be a Constitutional right have done so on a flawed analysis.

ARGUMENT

A. The Court lacks Jurisdiction

Historically, the federal judiciary has declared its courts in diversity cases to be without jurisdiction in the matters of state domestic relations. *Barber v. Barber*, 62 U.S.582 (1859); *Aukenbraudt v. Richards*, 504 U.S. 689 (1992). However, the issue of jurisdiction goes beyond diversity cases. In *Aukenbraudt* Justice Blackmun in a concurring opinion states:

> "Like the diversity statute, the federal question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal question cases to "Cases, in Law and Equity." Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal question jurisdiction (as under 28 U.S.C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody."

Id. at 715, fn. 8. In *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675, 2691 (2013), the Court made the following statement, quoting from *Haddock v. Haddock*, 201 U.S. 562, 575 (1906): "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and

divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." (Brackets are part of the quote.)

Reference is made to the brief of amicus curiae Eagle Forum Education & Legal Defense Fund for development of this fundamental issue.

B. The Case lacks a Substantial Federal Question

In *Baker v. Nelson*, 409 U.S. 810 (1972), the appeal was "dismissed for want of a substantial federal question." *Id.* at 810. This was an appeal from a decision by the Minnesota Supreme Court in the decision of *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The facts of the case are found in the Minnesota case and the case is referenced by the United State Supreme Court decision. The issue of whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex was clearly presented to the Court. The matter was before the Court by appeal pursuant to 28 U.S.C. § 1257, which at the time of the decision was not limited by writ of certiorari. (Statute was amended in 1988 to remove the route by appeal which was mandatory. *See* June 27, 1988, Pub.L. 100-352, § 3, 102 Stat. 662.) Though a summary decision, the Court addressed the matter on the merits. *Hicks v. Miranda*, 422 U.S. 332 (1975) "A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction." *Id.* at 343-344.

United States v. Windsor, __ U.S. __, 133 S.Ct. 2675 (2013) supports the decision of *Baker v. Nelson*.

> "Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."

Id. at 133 S.Ct. p. 2692. While acknowledging the federal intrusion on state power, the Court decided the case under the Due Process Clause of the Fifth Amendment because the federal statute, DOMA, intruded on the state power to decide what constitutes marriage. *Id.* at 133 S.Ct. p. 2692. It was the federal statute that gave the Court a "substantial federal question." Without the intrusion by the federal statute, there is no federal question. The final words in the majority opinion would appear to emphasize this conclusion, to wit: "This opinion and its holding are confined to those lawful marriages." *Id.* at 133 S.Ct. p. 2696. The opinion applies to "those lawful marriages", that being those from States which have voted in marriage between persons of the same sex. The opinion has no application otherwise.

Neither does *Lawrence v. Texas*, 539 U.S. 558 (2003) affect the holding in *Baker v. Nelson*. In Lawrence the Court, in addressing *Bowers v. Hardwick*, 478 U.S.

186 (1986), recognized the respect given to the traditional family. "It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. The Court in *Lawrence* then noted what the case did not involve: "It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578. *Lawrence* does not affect the holding in *Baker*.

In *Conde-Vidal v. Garcia-Padilla*, Dist. Ct. P.R. 2014-cv-1253, decided Oct. 21, 2014, p. 16-17 of opinion, the Court concluded: "Contrary to the plaintiffs' contention, *Windsor* does not overturn *Baker*; rather, *Windsor* and *Baker* work in tandem to emphasize the States' 'historical and essential authority to define the marital relation' free from 'federal intrusion.' *Windsor*, 133 S.Ct. at 2692." *Baker v. Nelson* is still good law.

C. Moral Disapproval is not Foreclosed by Lawrence

In a Fourteenth Amendment analysis, *Lawrence v. Texas*, 539 U.S. 558 (2003) does not foreclose consideration of a moral disapproval of homosexual conduct.

In *Stanley v. Georgia*, 394 U.S. 616 (1969), the Court held that the state of Georgia could punish the public distribution of constitutionally unprotected, obscene material, but could not punish the private possession of such material. The case involved the First Amendment, but it also involved the right of privacy under the Fourth Amendment. Justice Blackmon, in his dissenting opinion in *Bowers v.*

Hardwick, 478 U.S. 186 (1986), while criticizing the majority's treatment of *Stanley*, notes the importance of the Fourth Amendment in the ruling in *Stanley*.

> "The Court's interpretation of the pivotal case of *Stanley v. Georgia*, 394 U.S. 557 (1969), is entirely unconvincing. Stanley held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, Stanley relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. Ante at 195. But that is not what Stanley said. Rather, the Stanley Court anchored its holding in the Fourth Amendment's special protection for the individual in his home: . . . .
>
> "The central place that Stanley gives Justice Brandeis' dissent in *Olmstead* [*v. United States*, 277 U.S. 438 (1928)], a case raising no First Amendment claim, shows that Stanley rested as much on the Court's understanding of the Fourth Amendment as it did on the First. . . ."

Bowers at 207. Thus, in *Stanley* conduct that was legal in the privacy of one's home was not legal in the light of the public arena.

Justice O'Conner in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) would have struck the Texas statute on grounds of equal protection and not due process. The statute provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the

same sex." *Id.* at 563. The fact that the deviate sexual intercourse had to be done with one of the same sex implies that the same act could be lawful if done with one of the opposite sex. This distinction set up the equal protection violation. *Id.* at 579. Justice O'Conner framed the issue as follows: "[W]hether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy." *Id.* at 582. She concluded that it is not. "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* at 582. Justice O'Conner then stated the following:

> "That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations–the asserted state interest in this case–other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585.

In *Lawrence v. Texas*, the Court acknowledged the existence of a public moral disapproval of homosexual conduct.

> "It must be acknowledged, of course, that the Court in *Bowers* was making the broader

> point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. . . .
>
> "Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: 'Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards.' 478 U.S., at 196, 106 S.Ct. 2841."

Lawrence v. Texas, 539 U.S. at 571. Justice Kennedy noted, though, that "these considerations do not answer the question before us, however." *Id.* at 571. The case presently before the Court, though, is unlike *Lawrence*. This case addresses the public element, via the public recognition of marriage, and not the private element.

Moral considerations, by themselves, will not prevent the application of a liberty or privacy interest in the privacy of the home. However, what is permissibly done in the privacy of the home does not carry over to the public arena. As in *Stanley*, there may be a moral public condemnation of the same acts done in private when done in the public arena. As noted by Justice O'Conner, a moral disapproval, though not relevant to

homosexual conduct done in private, may be considered when the issue becomes a larger, more public matter, as the institution of marriage and there are additional reasons for the statute, other than merely a moral disapproval.

Thus, in the area of marriage between a man and woman there is the desire to foster biological families. Moral considerations may also exist such as the desire not to sanction homosexual conduct. Both are legitimate in the public arena.

In an analysis in the instant case under the Fourteenth Amendment a public moral disapproval of homosexual conduct is a relevant consideration. A public moral disapproval of homosexual conduct may be given recognition of existence and deference by the Court in the case before it. In limiting marriage to a man and a woman, a state may give support to the biological fact that the physical human anatomy is intended for sexual relations between a man and a woman with the possibility of conception and birth, regardless of what other constitutionally protected conduct may be done in private. A state is not constitutionally required to sanction homosexual conduct via a license to marry.

D. Leave it to the States

Supporters of same-sex marriage desire to analogize the issue to the civil rights of the 1960's and apply *Loving v. Virginia*, 388 U.S. 1 (1967) to the matter, notwithstanding that there is a clear distinction between "a marital relationship based merely upon race and one based upon the fundamental difference in sex." *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), appeal dismissed for want of a substantial federal question (*Baker v. Nelson*, 409 U.S. 810 (1972)).

Still, there is an analogy to the days of the civil rights of African American individuals as to voting rights. Kyle Searcy, who is the minister at Fresh Anointing House of Worship in Montgomery, Alabama, wrote a short editorial article in the Montgomery Advertiser on 2/13/15. After reflecting on the recent movie, "Selma", the re-enactment of the voting rights struggle for African Americans, he states:

> "I was made aware once again that the act of voting says I am a citizen. Voting declares that I matter. Voting indicates I have a voice, and at times, the power to make a change when I do not like the way things are going. Voting says my opinion counts.
>
> "My renewed pride in the power of the vote was dashed when I learned that U.S. District Judge Ginny Granade ruled in the case of *Searcy v. Strange* to disregard the voice and the vote of Alabamians.
>
> "In 2006, the Sanctity of Marriage Act was passed by more than 81 percent of the Alabama voters. These voters made it clear that the majority of Alabamians do not want to tamper with attempting to redefine an institution that is as old as humanity. But that did not seem to matter to Judge Granade.
>
> "...
>
> "I am no relation to Cari Searcy, and I find this opinion strange. If marriage is to be redefined in Alabama, let we the people do it. Let's go back to the booth that Jimmie Lee Jackson died trying to get into, and let our

> voice be heard. Better yet, since we have already spoken, let that voice be final.
>
> "There is currently a whole lot of shaking still going on over this issue right now. My prayer is that at the end of the day the voice expressed through our vote will rule."[2]

Here, the Petitioners request the overthrow of our State Constitutions. Out of the 50 states forming our United States, eleven (11) states (and the District of Columbia) have voted in same-sex marriage. Thirty-one (31) states voted in constitutional or statutory provisions that explicitly defined marriage as between a man and a woman.[3]

The Sixth Circuit in the case before this Court, while concluding that *Baker v. Nelson* controlled its decision, premised its decision on the right of the people to vote, to wit:

> "There are many ways, as these lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of

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[2] Editorial, Kyle Searcy, Pastor of Fresh Anointing House of Worship, "People spoke with their votes on marriage issue" Montgomery Advertiser, page 8A, Friday, February 13, 2015. The reference to *Searcy v. Strange* is to the case of *Searcy v. Strange*, in the United States District Court for the Southern District of Alabama, CV-14-0208, Memorandum Opinion and Order dated January 23, 2015.

[3] National Conference of State Legislatures, *State Same-Sex Marriage Laws* (as of 3/19/2015), *available at* http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#1 (last visited March 27, 2015)

> the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters."

DeBoer v. Snyder, 772 F.3d 388, 402-403 (6th Cir. 2014)

Even those in support of same-sex marriage want the matter to be voted upon by the States. James Dwyer, the Arthor B. Hanson Professor of Law at William & Mary University, laments over the assumed decision of this Court finding a constitutional right to same-sex marriage.[4]

> "Extending legal marriage to same-sex couples is morally right, but a judicial declaration of constitutional entitlement is the wrong way to do it.
>
> "It is wrong strategically, because a judicial victory cannot deliver the public statement of dignity that the marriage movement primarily seeks, and in fact eliminates its possibility. Instead of a majority of a state's people embracing their gay brother and sisters as equal and welcome fellow citizens, as statisticians predict would happen in every state within a decade, five inside-the-Beltway individuals will force change on the state, implicitly sending the opposite message: Your fellow citizens do not respect you."

The matter should be left to the States.

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[4] Editorial, James Dwyer, "Courtroom Wrong Place to Fight Marriage Battle" Montgomery Advertiser, page 5E-6E, Sunday, February 22, 2015.

E. Dictionary Jurisprudence

The Petitioner's Brief in case no. 14-571 (re. Michigan) attempts to have this Court commence its analysis with a definition of marriage that includes same-sex couples. *See* Part III.A, B, and C. The effort is to place the state statutes or state constitutional provisions under a strict scrutiny analysis rather than a rational basis analysis, and then require the State to offer compelling reasons for the statute or constitutional provision rather than having rational reasons satisfy the test. Other cases have done this.

In *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), the court, after recognizing marriage as a fundamental right under the Due Process Clause of the Fourteenth Amendment, concluded that marriage included same-sex marriage. "We do not dispute that states have refused to permit same-sex marriages for most of our country's history. However, this fact is irrelevant in this case because Glucksberg's [*Washington v. Glucksberg*, 521 U.S. 702 (1977)] analysis applies only when courts consider whether to recognize new fundamental rights. . . . Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, Glucksberg's analysis is inapplicable here." *Id.* at 376. Based upon *Lawrence* and *Windsor* the court declined "the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." *Id.* at 377. The court then applied a strict scrutiny analysis and found the state's reasons lacking.

The dissent by Judge Niemeyer found that the majority opinion "failed to conduct the necessary constitutional analysis." *Id.* at 385. "Rather, it has simply declared syllogistically that because 'marriage' is a

fundamental right protected by the Due Process Clause and 'same-sex marriage' is a form of marriage, Virginia's laws declining to recognize same-sex marriage infringe the fundamental right to marriage and are therefore unconstitutional." *Id.* at 385. The majority reaches its conclusion by "linguistic manipulation" (*Id.* at 386) and "dictionary jurisprudence" (*Id.* at 391). "If the majority were to recognize and address the distinction between the two relationships – the traditional one and the new one – as it must, it would simply be unable to reach the conclusion that it has reached." *Id.* at 386.

In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), the court found the alleged discrimination "suspect" and presumed the discrimination was a denial of equal protection, rebuttable only by a compelling showing by the state. *Id.* at 654-655. The court neglected the normal constitutional analysis, finding the reasons given by Wisconsin and Indiana in support of their statutes to be irrational. "The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal-protection cases." *Id.* at 656. For the same reasoning, the court avoided any analysis under the Due Process Clause. "It is also why we can avoid engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment." *Id.* at 656-657.

Other courts have recognized the failure of a proper analysis by the courts that have found state statutes and constitutional provisions barring same-sex marriage unconstitutional. In *Robicheaux v.*

Caldwell, 2 F.Supp.3d 910 (E.D. La. 2014), the court stated: "Admittedly, other federal courts throughout the country have spoken as if they were deciding the issue by discovering, at best, unclear case models on the more demanding standard of review. Or, in the name of rational basis, they have at times applied the more exacting review standards. This Court would be more circumspect." *Id.* at 918. "The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos." *Id.* at 925. "That federal courts thus far have joined in the hopeful chorus that the tide is turning seems ardent and is an arguably popular, indeed, poignant, outcome (whether or not credibly constitutionally driven)." *Id.* at 925.

In *Ex parte State of Alabama ex rel. Ala. Policy Inst.*, case no. 1140460, Ala. Sup. Ct., decided March 3, 2015, p. 91 of opinion, the court, in reference to the case of *Searcy v. Strange*, in the United States District Court for the Southern District of Alabama, CV-14-0208, stated: "It is, plainly and simply, circular reasoning – it assumes the conclusion of the matter, *i.e.*, that marriage as newly defined is a fundamental right, in the premise of the question without acknowledging that a change of terms has occurred."

CONCLUSION

One can have empathy for individuals who find sexual attraction with the same sex rather than the opposite sex. Yet, whether the human bodies, male and female, occurred by evolution or a divine design, the anatomy is designed only for heterosexual sex with the possibility of the production of human life. Recognition of this fact by the States in limiting marriage to being between a man and a woman is very rational and even compelling. If the Court finds

the States' definition of marriage unconstitutional, then this Court will have undertaken to define marriage.

The Amicus Curia respectively suggests that this Honorable Court affirm the decision of the Sixth Circuit and leave the determination of the definition of marriage to the States.

Respectfully submitted,

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